

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

KYLE WAYNE BANKSTON,
Petitioner,

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v.

§ C.A. NO. C-05-448

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE – INSTITUTIONAL DIVISION,
Respondent.

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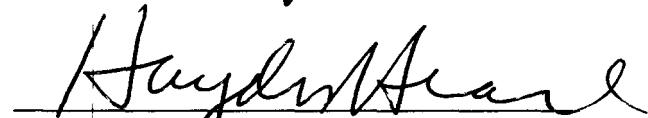
**MEMORANDUM OPINION AND ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS AND DENYING PETITIONER'S MOTION TO
HOLD IN ABEYANCE**

On June 16, 2006, the United States Magistrate Judge filed her Memorandum and Recommendation in this cause (D.E. 27). Objections were timely filed (D.E. 30), but are without merit. Having reviewed *de novo* the Magistrate Judge's Memorandum and Recommendation and the pleadings on file, this Court hereby adopts as its own the findings and conclusions of the Magistrate Judge.

Accordingly, respondent's Motion to Dismiss (D.E. 17) is granted and petitioner's cause of action for habeas corpus relief is dismissed without prejudice. Petitioner's Motion to Hold in Abeyance Respondent Dretke's Motion for Summary Judgment (D.E. 25) is denied as moot. An appeal may not be taken from a final order in a habeas corpus proceeding unless a circuit or district judge issues a certificate of appealability. Fed. R. App. P. 22(b)(1); 28 U.S.C. § 2253(c)(1)(a). For petitioner to be entitled to a certificate of appealability petitioner must show both that "jurists of reason would find it debatable

whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 120 S.Ct. 1595, 1604 (2000). Reasonable jurists could not disagree about whether petitioner’s claim must be brought as a 42 U.S.C. § 1983 claim as opposed to an application for habeas corpus relief. Therefore, if petitioner seeks a certificate of appealability, that request is denied.

ORDERED this 6 day of Aug, 2006.


HAYDEN HEAD
CHIEF JUDGE